SUPREME COURT, U. S.

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No. 612

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

CLARESA F. ARMSTRONG BROWN, *Petitioner,*

v.

COMMERCIAL NATIONAL BANK OF PEORIA, as Trustee, *et al., Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of the Tenth Judicial Circuit of Illinois, entered October 24, 1966, is unreported but appears in the record of this case, pp. C 1204-C 1214, and is printed in Appendix A hereto, *infra,* pp. 1a-9a. The opinion of the Appellate Court (Third District), State of Illinois, which was affirmed

by the Supreme Court of Illinois in the above entitled case, is reported in 94 Ill. App. 2d 273, 237 N.E. 2d 507, and is printed in Appendix B hereto, *infra,* pp. 10a-16a. The opinion of the Supreme Court of Illinois is reported in 42 Ill. 2d 365, 247 N.E. 2d 894, and is printed in Appendix C hereto, *infra,* pp. 17a-21a. The order of the Supreme Court of Illinois, entered on July 17, 1969, which the Petitioner seeks to review is not publicly reported; but the letter from the Clerk of the Supreme Court of Illinois setting forth this order is reproduced in Appendix D hereto, *infra,* p. 22a.

JURISDICTION

The Supreme Court of the United States does not have jurisdiction in this case because the question presented was not raised in a timely fashion in the state courts.

QUESTION PRESENTED FOR REVIEW

Was there a denial of due process when three of seven justices of a state supreme court held corporate offices, disclosed as a matter of public record, in corporations which were neither parties to the litigation in question nor had any interest in the outcome of the case before them on appeal?

COUNTERSTATEMENT OF THE CASE

Petitioner's insistence, in her statement of the case (p. 3 of Petition), on misstating the trial court's findings of fact and emasculating the rule of law followed, notwithstanding the appellate court's and supreme court's affirmance in each instance, necessitates the following counterstatement of the case:

This case originated when the Respondent Bank filed its Complaint seeking approval of its accounts and its investment policy with respect to two irrevocable trusts made by Clara K. Meyer on January 15, 1962, one of which trusts was principally for the benefit of her daughter, Claresa, who is the Petitioner, and the other one of which was principally for the benefit of her son, Richard, who is one of the Respondents. The Petitioner then counterclaimed, seeking to set aside both trusts. As found by the trial court (App. 8a), the Bank's action grew out of a desire to have its investment policy with respect to Petitioner's trust, which had repeatedly been questioned by Petitioner, approved by the Court. The trial court further found that Petitioner's Counterclaim, seeking to set aside both trusts on grounds of undue influence on the part of the Bank, was filed only after she found she could not completely dominate the investment policy with respect to her trust (App. 7a). Petitioner also counterclaimed to set aside an irrevocable trust made by Clara K. Meyer on January 7, 1960, principally for the benefit of three of her four grandchildren, all four being children of her son, Richard. After considering over 2,000 pages of testimony and several hundred exhibits, the trial court, without making a special finding of evidentiary facts, expressed an opinion concerning the ultimate facts, to-wit: That Clara K. Meyer, the settlor, was neither incompetent nor in such a weakened mental condition that she could be easily influenced, nor was she in a subservient position to the officers and employees of the Bank or to her son and daughter at the time of the execution of the trusts (App. 3a); that the basic idea for both the 1960 and 1962 trusts was initiated by the settlor and not by the Bank or either of her two children (App. 7a); that the trusts were not

"procured" by the Bank out of self-interest (App. 7a); that under Illinois law the Bank was not a beneficiary in the transaction (App. 4a, 5a); that the settlor had capable and adequate independent counsel of her own choosing (App. 6a); and that, in all respects, the equities were with the Plaintiff and again the Counterclaimant (App. 9a). Petitioner appealed to the Appellate Court of the State of Illinois, Third District, which unanimously affirmed, in all respects, the trial court.

From the appellate court, Petitioner appealed to the Supreme Court of the State of Illinois, which unanimously affirmed the judgment of the appellate court, and specifically found the evidence *not* to support either Petitioner's claim that the settlor's attorney, Boyd Goldsworthy, was not independent counsel or that there existed a conspiracy between the settlor's son, Richard Meyer, Goldsworthy or Bank vice president Frank Mayne, to discontinue the retainer of Attorney John Elliott (App. 21a).

On the law, the trial court—contrary to Petitioner's bald assertion at p. 3 of her Petition—did not hold that the Bank was exempt from its fiduciary obligations because its only gain was its fees; rather, it merely followed established Illinois law to hold that the mere receipt of management fees did not create a presumption of fraud, unfairness or undue influence on the part of the fiduciary. On this point the trial court was affirmed by the appellate court (App. 15a) and the Illinois Supreme Court (App. 20a). Petitioner's Petition for Rehearing by the Illinois Supreme Court was denied on May 27, 1969.

Approximately six weeks later, Petitioner moved the Illinois Supreme Court to reconsider its order of May

27, denying Petition for Rehearing, alleging for the first time that since three justices of the supreme court were directors and stockholders of banks, she had been denied due process of law as guaranteed to her by the Fourteenth Amendment. The Illinois Supreme Court, with the three justices not participating, denied the motion, but allowed Petitioner's motion to recall and stay the mandate pending disposition of Petition for Writ of Certiorari in the Supreme Court of the United States (App. D).

REASONS FOR DENYING THE WRIT

1. The Supreme Court Should Deny the Petition for a Writ of Certiorari in This Case Because the Federal Question Was Not Raised in a Timely Manner in the State Court

It is well settled that failure seasonably to raise the federal question in accordance with the requirements of state law will preclude review by the United States Supreme Court. *Edelman* v. *People of the State of California,* 1953, 344 U.S. 357, 73 S. Ct. 293. Illinois law is clear that a party cannot for the first time on a petition for rehearing raise questions which were not urged or argued on appeal. *Wandschneider* v. *Wandschneider,* 1918, 282 Ill. 286, 118 N.E. 486; *Sobina* v. *Busby,* 1965, 62 Ill. App. 2d 1, 210 N.E. 2d 769; *Rose* v. *City of Chicago,* 1942, 317 Ill. App. 1, 45 N.E. 2d 717. Indeed, under Rule 341 of the Rules of the Supreme Court of the State of Illinois, new points cannot be raised even in reply briefs. *Ill. Rev. Stat.* 1967, ch. 110A, § 341(g); *People* v. *123 Punch Boards,* 1956, 8 Ill. 2d 520, 134 N.E. 2d 763. Stated another way, a petition for rehearing, filed in the state court after judgment, which has been denied is not a part of the record before the United States Supreme Court. *Grame* v. *Mutual Assurance Society of Virginia,* 1885,

154 U.S. 676, 14 S. Ct. 1193; *Simmerman* v. *State of Nebraska,* 1885, 116 U.S. 54, 6 S. Ct. 333. The court stated in *Susquehanna Boom Co.* v. *West Branch Boom Co.,* 1884, 110 U.S. 57, 3 S. Ct. 438, that:

> ". . . our jurisdiction extends only to a review of the judgment as it stands in the record. We act on the case as made to the Court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment on a petition for rehearing. Such a petition is no part of the record on which the judgment rests." (P. 59.)

The only exception to the rule that raising a federal question by petition for rehearing to the state appellate court comes too late is where the decision of that court has unexpectedly given rise to a federal question which the party seeking review has had no previous opportunity to assert and could not fairly have anticipated. *State of Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 1930, 281 U.S. 313, 50 S. Ct. 326.

Petitioner's failure to raise the issue of the extent to which the holdings of three justices of the Illinois Supreme Court in banks may have denied her due process of law when the justices decided a case involving a bank does not fit within this exception. As noted by Petitioner herself on p. 7 of her Petition, information as to who are stockholders or directors of banks is a matter of public record, and this would have been easily obtainable by Petitioner before prosecuting her appeal to the Illinois Supreme Court, thereby giving the justices in question an opportunity to consider disqualifying themselves. Not only did Petitioner utterly fail to raise the issue on her appeal, but she still had not apprised herself of information which was a matter

of public record when she filed her first Petition for Rehearing. Even the most casual investigation would have revealed, for example, that this information, in the case of directors, was on file in the Office of the Comptroller of the Currency (12 U.S.C.A. § 73, printed in pertinent part in Appendix E hereto), and also available in the *American Bank Directory,* which is published four times a year. In the case of shareholders, the information was also available as a matter of public record. *Ill. Rev. Stat.* 1967, ch. 120 §§ 499 and 557 (printed in pertinent part in Appendix F hereto) provide that shares in state and national banks are to be assessed and listed as personal property. Ch. 120 §§ 584, 585 (printed in pertinent part in Appendix F hereto) provided for the publication of the assessment lists which indicate, among other things, the names of the banks in which shares are owned and the assessed valuation of same. Having failed to raise the question in a timely fashion, Petitioner is now barred from pursuing the matter any further.

2. The Petition for a Writ of Certiorari Was Not Filed in a Timely Fashion

28 U.S.C.A. § 2101(c) provides that a writ of certiorari must be applied for within ninety days after the denial of a petition for rehearing in the court below. Thus, since the Illinois Supreme Court denied Petitioner's Petition for Rehearing on May 27, 1969, the last day on which she could file her Petition for a Writ of Certiorari was August 25, 1969. By waiting until September 18, 1969, to file, Petitioner's action is not timely.

3. Inasmuch as Petitioner's Belated Contention Has Been Considered by Four Justices, Whom Petitioner Accepts as Impartial, a Federal Question No Longer Exists

If it is found that the Petition has been filed in time, then such a finding recognizes implicitly that the relevant order of the Illinois Supreme Court denying her Petition for Rehearing is the order of July 17, 1969, instead of the order of May 27, 1969. Only by recognizing the order of July 17 as such can it be said that the Petition is timely, since Petitioner's ninety-day period would have begun to run from that day and her filing on September 18 would be within the ninety-day period. Therefore, the conclusion is inescapable that the merits of Petitioner's original claim in the circuit court of Peoria County, whose findings were upheld by the appellate court and Illinois Supreme Court, were again considered and rejected by the latter court—the last time being on July 17. The decision by the court on that date was made without the participation of the chief justice and two justices who owned shares in banks and were directors, a fact which Petitioner, presumably through inadvertence, fails to mention but which is made clear in the communication from the Clerk of the Illinois Supreme Court to counsel for the parties to the suit which is reproduced in Appendix D hereto. Thus, the merits of Petitioner's original claim were considered and rejected by the impartial court which Petitioner again seeks by requesting the United States Supreme Court to remand the case for consideration by only four justices. Inasmuch as Petitioner's belated contention has been considered by four justices, whom Petitioner accepts as impartial, a federal question no longer exists, if, in fact, there ever was one.

4. Petitioner Misstates the Holdings in Cases Which, Correctly Analyzed, Utterly Fail to Support Her Contention

In her Petition, Petitioner cites four cases in support of the contention that the three justices of the Illinois Supreme Court who owned bank stock and were directors were thereby disqualified to participate in deciding the appeal in this case. It should be restated for clarification that none of the justices owned any stock in, nor were they directors of, nor were they in any way connected with the Commercial National Bank of Peoria, the Respondent Bank. It is submitted that not only do the cases cited in her Petition bear no factual resemblance to the case at bar, but the law in each case does not support Petitioner's conclusions. In *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 1968, 393 U.S. 145, 89 S. Ct. 337, from which Petitioner has arranged a deceptive quotation by connecting isolated passages from some three pages of the opinion (p. 5 of Petition), Commonwealth Coatings Corporation, a subcontractor, sued the sureties on the prime contractor's bond to recover money alleged to be due for a painting job. The third arbitrator chosen pursuant to an agreement to arbitrate the controversy was a consulting engineer who had been retained by the prime contractor in the past. Although the court noted that there had been no dealings between them for about a year immediately preceding the arbitration:

> "Nevertheless, the prime contractor's patronage was repeated and significant, involving fees of about $12,000 over a period of four or five years, and the relationship went so far as to include the rendering of services on the *very projects involved in this lawsuit.*" (Emphasis added.) 393 U.S. 145, at 146.

Holding that, in the absence of disclosure to the subcontractor, the "close financial relations that had existed between [the third arbitrator and the prime contractor] for a period of years" (p. 148) gave rise to an appearance of bias, the court reversed and remanded.

Tumey v. *Ohio,* 1927, 273 U.S. 510, 475 S. Ct. 437, involved the constitutionality of an Ohio statute which provided for the trial by the mayor of a village of one accused of violating the Prohibition Act. Under the statute, the mayor's sole compensation as judge was paid by the defendant, if convicted. The court held that the direct dependence of the mayor upon convictions for compensation for his services was inconsistent with due process of law:

> "But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a *direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.*" (Emphasis added.) 273 U.S. 510, at 523.

The banks which the three justices are associated with were not and are not parties to this action, nor is it shown how these banks could in any way be affected by the outcome of these proceedings. Thus, the three justices herein had no direct, personal or substantial pecuniary interest in reaching a conclusion in this case.

Petitioner concedes that *In re Murchison,* 1955, 349 U.S. 133, 75 S. Ct. 623, bears no factual analogy to the case at bar, and then goes on to misstate *In re Honolulu Consolidated Oil Co.,* 1917, 243 Fed. 348,

to stand for the proposition that a judge must disqualify himself where he has no direct interest in the case then at bar, but owns stock in another corporation that "might be involved in similar litigation." (P. 6 of Petition.) That case involved an interpretation of Section 20 of the Judicial Code, which pertained to disqualificaton: ". . . whenever it appears that the judge of any District Court is in any way concerned in interest in any suit." The facts of the case were that the United States Government, as part of a unitary scheme or plan of litigation, had brought suit against various oil companies to recover possession of oil lands and obtain judgments for the value of oil or mineral extracted therefrom. One of the questions in each case was the rule of damages to be followed; and so far as the decision of this question was concerned, the cases were practically identical. Although the presiding judge had no direct interest in the case at bar, he was a former shareholder in another one of the defendant companies which had already been sued by the United States as part of the same plan. As a former shareholder, he could have been liable under a California statute even though he no longer held shares in the company at the time it was sued. Given the obvious interest of the district judge in arriving at a rule of damages in the case at bar which would minimize his potential shareholder's liability in the other case pending, the Court of Appeals for the 9th Circuit issued a writ of mandamus directing the judge to disqualify himself from hearing the case.

Petitioner, however, misapprehends the holding of *Honolulu Consolidated Oil* when she reads it to hold that a judge is disqualified from hearing a case when he has no direct interest in the case, but owns stock

in another corporation that "might" be involved in similar litigation. On Petitioner's view of the case, no judge who happened to own stock in a corporation could ever hear a case involving a corporate party in which he had no interest whatsoever, because of the possibility—irrespective of how remote it might be—that the judge's resolution of the legal issues therein could conceivably be relevant at another time and in another case, involving a corporate party in which the judge did own stock and for this reason disqualified himself. For example, under Petitioner's theory a judge who owns stock in any corporation could not decide a case involving a corporate party (in which he has no direct interest) which contests the constitutionality of a corporate income tax.

Correctly stated, *Honolulu Consolidated Oil* stands for the proposition that a judge must disqualify himself where two cases are pending, one against each of two corporate parties, and the judge's decision in the first case involving a corporate party in which he holds no direct interest will have a direct effect on the resolution of the issues in the second case involving a corporate party in which he is a shareholder. To state the holding otherwise, as Petitioner does on p. 6 of her Petition, bespeaks—at least—a total misunderstanding of the law in the case.

Arguments similar to Petitioner's have been made in two California cases; and the court in each instance rejected the claim of bias. In *Central Savings Bank* v. *Lake,* 1927, 201 Cal. 438, 257 P. 521, *cert. denied* (1927), 275 U.S. 571, the trial judge owned stock in a title insurance company which had insured title under terms of trust deeds similar to that which the judge was now asked to construe. The supreme court of

that state held the judge properly qualified to hear the cause where the title insurance company in which he owned stock was not a party and had not issued title insurance on the particular property involved. The defendants' arguments in that case sound very much like Petitioner's:

> "[T]he defendants contend that, if in the present proceeding it be declared that the said trust deed and the sale thereunder be unauthorized and void under the laws of this state, then such other trust deeds covering property, the title to which has been insured by said title company, would also be void and the said judge would suffer a loss in proportion to his stock interest by reason of the policies of title insurance heretofore issued on such other properties." 257 P. at pp. 523-524.

The court responded to this argument thusly:

> "The interest so alleged is so indirect, incidental, remote, and contingent as not to bear the slightest resemblance to the *direct, measurable, and pecuniary interest in the subject-matter of the action* required to be shown in order to disqualify the judge." (Emphasis added.) (P. 524.)

In *Goodspeed* v. *Great Western Power Co. of California,* 1937, 19 Cal. App. 2d 435, 65 P. 2d 1342, the question before the district court of appeals in California was whether a judge was properly qualified to hear a cause for alleged fraud in selling stock, in view of the judge's ownership of stock in banks which in turn owned stock similar to that allegedly fraudulently sold, where the banks were not a party to the action nor a member of the class which could intervene or which would directly profit by any judgment. The question was raised under a California statute which

required disqualification when the judge was interested as a holder of any capital stock of a corporate party, or when it appeared probable that, by reason of bias or prejudice of the judge, a fair and impartial trial cannot be had before him. Since the two banks were not members of a class which could intervene or would profit directly by the outcome within the meaning of the Civil Code, the court did not find an interest on the part of the judge sufficient to disqualify him:

> "Interest in law, as applied to a judge, had and must have a highly special and definite meaning. It means an interest direct, proximate, inherent in the instant event. It does not mean an interest in a similar suit against the same or other defendants; *it does not mean an interest in a point of law as such,* or in an issue of fact as such, or in any general or special phase of the case. It means a *definite, material, financial stake in the direct outcome of the particular case.*" (Emphasis added.) 65 P. 2d 1345.

To obfuscate further the issues in this case, Petitioner contends that the justices' alleged bias is evinced by the fact that the Supreme Court of the State of Illinois "established a novel rule of law" (P. 2 of Petition) "never before suggested by any court of last resort, that the bank was exempt from its fiduciary obligations because its only gain was its fees." (P. 3 of Petition.) In so doing, Petitioner inexcusably distorts the holdings of every court which has considered this case. As the opinions of the Trial Court, the Appellate Court of the State of Illinois, Third District, and Illinois Supreme Court make abundantly clear (App. pp. 4a, 14a, and 20a, respectively), the

rule of law followed was simply the established Illinois rule that the mere receipt of management fees does not create a presumption of fraud, unfairness or undue influence on the part of the fiduciary. Reading the holdings of these three courts, as Petitioner does, to mean that the "bank was exempt from its fiduciary obligations because its only gain was its fees", and then basing her argument to this Court on this misstatement of the holding, borders on the ludicrous.

Petitioner also conveniently ignores the continuing supervision of the trustee provided for in the Trial Court's opinion:

> "Finally, it is the opinion of the Court that the equities in this matter are, in all respects, with the Plaintiff and Counterdefendants and against the Counterclaimant. A decree should be prepared finding both the 1960 and the 1962 trusts valid and establishing the 1962 trusts under the supervision of the Court with reports to be prepared, filed and submitted to the Court for its approval annually, upon notice to the beneficiaries, until further Order of the Court." (App. 9a.)

CONCLUSION

While as suggested by Petitioner, the embarrassments which have befallen the judiciary in the past year are regrettable indeed, surely this situation can only be exacerbated by pious-sounding litigants who pretend to lament these embarrassments while at the same time opportunistically exploiting them by means of crass exaggeration, legal sophistry and misstatements of fact, to obtain a hearing in the United States Supreme Court.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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